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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Lucent's Third Supplement to Petition for	)	WC Docket No. 02-147
	)	
Declaratory Ruling on State Consumer Protection Laws as They Relate to AT&T/Lucent Leasing of Consumer Premises Equipment	)	

To: The Commission

COMMENTS OF CHARLES SPARKS ET AL.

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SUMMARY

Almost 20 years ago, the Commission determined that customer premises equipment ("CPE") used in interstate telecommunications services should be unbundled and removed from tariff regulation. Finding that continued state tariffing of CPE would necessarily undermine the Commission's detariffing policy, the FCC demanded that states "remov[e] . . . traditional utility type regulation over CPE."[1/] The Commission was clear, however, that it was preempting states' regulation "only to the extent that their terminal equipment regulation is at odds with the regulatory scheme we have set forth."[2/] And the Commission never even came close to making the unprecedented suggestion that traditional state consumer protection damages claims alleging fraudulent or deceptive conduct by AT&T *after* the transition to deregulation would be preempted by its CPE orders. The extent of the Commission's preemption was thus properly limited to that necessary to keep a state from negating a valid FCC policy.

The Commission's 1999 *Amicus* Memorandum,[3/] filed in a still pending Illinois consumer protection class action involving AT&T's and Lucent's ongoing leasing of CPE, confirmed this unsurprising proposition. Lucent's Third Supplement disputes nothing the Commission wrote in that *Amicus* Memorandum. Yet Lucent continues to argue that the FCC's CPE detariffing orders

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1/ Memorandum Opinion and Order on Further Reconsideration, *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512 ¶ 33 (1981) ("*Further Reconsideration Order*").

2/ Memorandum Opinion and Order, *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 84 F.C.C.2d 50 ¶ 154 (1980) ("*Reconsideration Order*").

3/ Memorandum of Federal Communications Commission as *Amicus Curiae*, *Crain v. Lucent Technologies*, No. 96-LM-983 (Ill. 3d Jud. Cir. Ct., Madison County) (filed May 24, 1999) ("*Amicus* Memorandum").

effectively preempted those state law damages claims. That argument fails for several, independently sufficient reasons.

First, the text and purpose of the Commission's CPE detariffing orders fully support the notion that the Commission meant to preempt only "traditional utility type regulation over CPE." The Commission's approval of AT&T's proposed "notification program" in those orders — which Lucent now holds forth as embodying a fundamental FCC policy that must be protected from even any *potential* encroachment — was just one small part of a transition program, which itself was no more than part of the means to the deregulated end. The Commission never suggested that anything about the transitional CPE leasing program represented some independent FCC goal meriting special or additional preemptive scope. Thus, there is no reason to believe the Commission did not mean what it said when it explained that it was preempting the States "only to the extent that their terminal equipment regulation is at odds with the regulatory scheme we have set forth."[4/]

Second, given the narrow scope of permissible preemption by federal agencies, it is doubtful that the Commission *could* have preempted traditional state law damages claims of the kind pending in Illinois state court. In addition to requiring an express intention to preempt, agency preemption extends only to the extent necessary to keep a state from negating valid agency regulatory goals. The Commission's straightforward regulatory goal in its CPE detariffing program was to open CPE completely to market forces by unbundling and deregulating it. That goal has been achieved, and there is no possibility that plaintiffs' suit could undo that success. Indeed, by holding AT&T and Lucent to generally applicable consumer protection laws, plaintiffs' suit *furthers* that goal.

4/ *Further Reconsideration Order* ¶ 33.

None of these propositions should be controversial. Lucent now argues, however, that new "developments in late 2001" require revisiting them. It speculates that, if plaintiffs' state damages action is allowed to proceed, it might result in "retroactive ratemaking" or rulings inconsistent with "findings"[5/] in the CPE orders. This claim is wrong on both the facts and the law.

As an initial matter, the "developments" on which Lucent ostensibly bases its Third Supplement are not court rulings on this issue (of which there have been none since 1999), or even new filings. Rather, they are nothing more than Lucent's spin on various expert reports and depositions produced and taken in the usual course of discovery. More important, there are no broad preemptive findings of the kind Lucent purports to discern from the existence (though not the language) of the Commission's orders. And as plaintiffs' Third Amended Complaint makes clear, plaintiffs' claims do not rely on a finding that Lucent or AT&T have or had market power over the sale of CPE, they do not necessitate the determination of a "proper lease rate," and they do not challenge the AT&T notification program approved by the FCC — or any other pre-1986 conduct. The Supreme Court in *Cipollone v. Liggett Group, Inc.*[6/] found that state damages claims brought against cigarette companies based on inadequate disclosure were not preempted even when *Congress* had *specifically forbidden* States from requiring any warning label other than that mandated by Congress itself. Lucent's claim that the Commission's wholly unrelated and expressly limited preemption here implicitly had a far broader scope (even though agency preemption is more limited than statutory preemption) fails *a fortiori* under *Cipollone*.

5/ Lucent Technologies Inc.'s Third Supplement to Petition for Declaratory Ruling, *In the Matter of Motion of Lucent Technologies Inc. For a Declaratory Ruling*, at 2 (filed May 23, 2002) ("Third Supplement").

6/ 505 U.S. 504 (1992).

In any event, principles of federalism and comity, as well as established Commission preemption policy, demand that the Commission not "interfere with any state court proceedings," particularly now — *before* the *Sparks* litigation has even given rise to any decision that could in any way be couched as interfering with any valid Commission regulatory policy or goal.

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To: The Commission

COMMENTS OF CHARLES SPARKS ET AL.

Charles Sparks and Margaret Little, individually and on behalf of the plaintiff class in *Sparks v. AT&T*, Case Nos. 96-LM-983, 01-L-1668 (Ill. 3d Jud. Cir.), respectfully file these comments with respect to the issues raised by the recent supplement to the above-referenced petition.

Introduction

On May 23, 2002, Lucent Technologies, Inc. ("Lucent") filed a "Third Supplement" to the petition for a declaratory ruling that Lucent and AT&T Corp. ("AT&T") filed three years ago, regarding the preemptive scope of the Commission's CPE detariffing orders with respect to the claims at issue in *Sparks*. This Third Supplement, ostensibly based on "developments in late 2001,"[1/] in fact reflects no changes in that case since the Commission filed its *Amicus* Memorandum with the Illinois court in 1999. To the contrary, the Third Supplement refers only to Lucent's characterization of material produced in discovery in the *Sparks* case, which has not yet gone to trial. It is thus no more than an excuse to recycle preemption arguments that the

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1/ Third Supplement at 1.

Commission, the Illinois trial court, and the Illinois appellate courts already have rejected. As the plain language of both the Commission's original CPE detariffing orders[2/] and its 1999 *Amicus* Memorandum make clear, the Commission explicitly limited the scope of its preemption to "utility type regulation over CPE."[3/]

Lucent's continuing efforts to twist the meaning of "utility type regulation" beyond all recognition depend largely on its assiduous avoidance of both the actual text of the Commission's orders, and the Commission's long established premise for deregulation that consumers may thereafter "take advantage of remedies provided by state consumer protection laws and contract law against abusive practices."[4/] They also ignore the Supreme Court's repeated cautions that in our federal system even *statutory* preemption of such traditional state remedies may not be presumed without a clear showing of an intention of Congress to preempt, or the demonstrated frustration of an important federal policy. Nor is there any support in the Commission's prior CPE decisions for accepting Lucent's invitation to lay down ground rules to govern what evidence a trial court can entertain during the course of state court litigation. Whether AT&T held "market power" with respect to embedded lease customers, or whether it had obligations to avoid misleading those customers *after the conclusion of the FCC's two-year transition program*, are issues the Commission's CPE decisions left to state consumer protection law applicable to all firms. AT&T and Lucent's efforts to persuade the Commission to interfere

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2/ Final Decision, *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980) ("*Final Decision*"); *Reconsideration Order*; *Further Reconsideration Order*.

3/ *Further Reconsideration Order* ¶ 33.

4/ Second Report and Order, *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730 ¶ 5 (1996).

with pending state court proceedings, prior even to any decision by any state court on these established state law claims, should be definitively and promptly rejected.

The Nature and History of the *Sparks* Litigation

Almost 20 years ago, the Commission determined that CPE should be unbundled and removed from tariff regulation.[5/] Since that time, CPE has been completely detariffed at both the federal and state levels.[6/] The Commission provided for a two-year transition period for leased residential CPE applicable here, which expired on January 1, 1986.[7/]

Sparks is a class action brought on behalf of consumers who have continued to lease CPE from AT&T and Lucent rather than buying their own. It challenges solely the practices of AT&T (and Lucent as its successor), is focused solely on conduct occurring *after* the end of the Commission's two-year transition program for leased CPE, and is based solely on state consumer protection theories. Because the extraordinary Commission intervention that AT&T and Lucent seek is designed to, and would, affect only this one specific case,[8/] we describe here the history of that case in some detail.

5/ *See Final Decision*; *Reconsideration Order*; *Further Reconsideration Order*.

6/ *See* Report and Order, *In the Matter of Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry) American Telephone and Telegraph Company, Request for Approval To Supplement the Capitalization of AT&T Information Systems in Connection with the Transfers of Embedded Customer Premises Equipment*, 54 R.R.2d 1551, 1594 n.84 (1983).

7/ *See id.*

8/ This action has been certified as a *nationwide* class action for all such consumers. Order, *Crain v. Lucent Technologies*, No. 96-LM-983, at 2 (Ill. 3d Jud. Cir. Ct., Madison County) (July 27, 2001). Lucent's suggestion of a "Pandora's box" of other cases (Third Supplement at 18) neglects to disclose that all four other pending actions have been stayed pending litigation of this one. Plaintiffs' counsel in three of these other actions are also co-counsel in *Sparks*, which will be controlling in any further litigation for any members of the class who do not elect to opt out of it.

Plaintiffs' Third Amended Complaint purportedly forms a basis for Lucent's new supplement.[9/] In that complaint, plaintiffs allege that *beginning after the FCC transition*, AT&T and Lucent engaged in unlawful conduct that induced plaintiffs to continue to pay for the lease of residential CPE through a variety of "unconscionable, unfair and deceptive acts and practices."[10/] As the Illinois appellate court has expressly held in rejecting AT&T/Lucent's preemption argument almost two years ago, "Plaintiff's complaint challenges conduct and practices that occurred after [these FCC CPE] restrictions were lifted."[11/] The challenged conduct and practices include principally failing from 1986 onward adequately to disclose (1) the fact that lease payments "far exceeded the actual value of the telephone equipment and related leasing services," (2) the existence of "meaningful alternatives" in lieu of leasing, (3) the fact that leasing was not required in order to continue to receive telephone service, and (4) the existence of material changes to the terms and conditions of the leasing program.[12/] Plaintiffs also allege that AT&T and Lucent have submitted monthly bills designed to conceal the inclusion of charges for leasing telephones.[13/]

In addition, the Third Amended Complaint alleges that the rental charges for these leased phones have been unconscionable under state law, since the phones and associated services "had

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9/ *See* Third Supplement at 1, 5.

10/ *See* Third Amended Complaint, *Sparks v. AT&T Corp.*, No. 96-LM-983 ¶¶ 9, 21, 29, 75-77 (Ill. 3d Jud. Cir. Ct., Madison County) (filed Nov. 5, 2001) ("Third Amended Complaint") ("From January 1, 1986, and continuing . . . .").

11/ *Crain v. Lucent Technologies, Inc.*, 739 N.E.2d 639, 646 (2000).

12/ Third Amended Complaint ¶ 21.

13/ *Id.*

little or no monetary value."[14] However, plaintiffs do not seek — as Lucent alleges in an effort to characterize *Sparks* as "tantamount" to "utility-type rate regulation"[15] — to reduce their lease rates retroactively or prospectively as a result of the foregoing practices. Rather, they seek damages "in an amount equal to *all charges* which Defendant AT&T and its successor Lucent have collected from each of them for residential telephone rental from January 1, 1986, through January 20, 2000, as well as other damages which may be established at trial."[16]

Plaintiffs filed their original complaint in September 1996.[17] In January 1999, AT&T and Lucent sought judgment on the pleadings based on preemption arguments similar to those Lucent recycles here. Their motion equated plaintiffs' consumer protection claims with efforts by state PUCs to tariff CPE, and asserted that both were expressly preempted by the Commission's CPE orders.[18] AT&T and Lucent also argued that "the federal government, rather than the states, has exclusive power over embedded CPE," and that each of plaintiffs' claims "has been resolved by the FCC."[19] Shortly thereafter, the Illinois trial court granted the AT&T/Lucent motion. In so doing, the court relied on the Commission's allegedly "pervasive undertaking" with respect to CPE to conclude that plaintiffs' claims "fall within the contours of the concerns studied by the FCC and addressed in its Order to the extent it deemed

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14/ *Id.*

15/ Third Supplement at 11.

16/ Third Amended Complaint ¶¶ 21, 29 *et seq.* (emphasis added).

17/ Complaint, *Crain v. Lucent Technologies*, No. 96-LM-983 (Ill. 3d Jud. Cir. Ct., Madison County) (filed Sept. 5, 1996).

18/ Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings under 735 ILCS 5/2-615(e), or Alternatively to Dismiss or Stay, *Crain v. Lucent Technologies*, No. 96-LM-983, at 14-15 (Ill. 3d Jud. Cir. Ct., Madison County) (filed Jan. 5, 1999).

19/ *Id.* at 13-14.

appropriate."[20/] It agreed with AT&T and Lucent that the duties alleged in the complaint "pertain to the subject matter considered by the FCC" and thus are inconsistent with its "subsequent regime of deregulation."[21/]

Plaintiffs moved for reconsideration of the court's ruling, arguing that it had misread the Commission's CPE orders and ignored the Commission's express intent to limit the scope of its preemption.[22/] In May 1999, the Commission filed its *Amicus* Memorandum in support of the plaintiffs' motion. AT&T and Lucent objected to the filing of that memorandum, notwithstanding their prior claim that the FCC had "resolved" all of the plaintiffs' claims.[23/] The trial court accepted the memorandum, after providing the parties with an opportunity to respond to it.[24/]

In its memorandum, the Commission advised that "the Court erred in holding that the Commission had preempted [the plaintiffs'] claims."[25/] The Commission explained that it had expressly limited the scope of its preemption in its CPE orders "only to the extent that [state] terminal equipment regulation is at odds with the regulatory scheme we have set forth."[26/] Thus,

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[20/] Order, *Crain v. Lucent Technologies*, No. 96-LM-983, at 2 (Ill. 3d Jud. Cir. Ct., Madison County) (Mar. 10, 1999).

[21/] *Id.*

[22/] Plaintiffs' Motion for Reconsideration of the Court's March 10, 1999 Order, *Crain v. Lucent Technologies*, No. 96-LM-983 (Ill. 3d Jud. Cir. Ct., Madison County) (filed Apr. 8, 1999).

[23/] *See* Order, *Crain v. Lucent Technologies*, No. 96-LM-983, at 1 (Ill. 3d Jud. Cir. Ct., Madison County) (July 2, 1999).

[24/] *Id.* at 1-2.

[25/] *Amicus* Memorandum at 1.

[26/] *Id.* at 4 (quoting *Further Reconsideration Order* at 523 (quoting *Reconsideration Order* at 103)).

it had "preempted state tariff regulation of CPE under public utility statutes; but it did not intend to preempt the application of more general state laws to telephone companies that provide CPE in a competitive market."[27/]

The Commission also made clear that this approach was required by virtue of a federal administrative agency's limited powers to preempt state law. Those powers, it advised the court, require an agency to show "that preemption is *necessary.*"[28/] As the Commission advised the court, it had "expressed no such intention and made no such showing with respect to preemption of state regulation of CPE vendors *outside the public utility tariffing context.*"[29/] Quite the contrary: "preempting generally applicable consumer protection and contract laws . . . would have been *inconsistent* with the Commission's objective of allowing all CPE vendors to compete on an equal basis subject to the same set of constraints and freedoms."[30/] The Commission also pointed out that "in the analogous context of detariffing interexchange services," it had "stated explicitly that state consumer protection and contract law would apply after detariffing."[31/] Finally, the Commission explained that its two-year transition program for leased CPE had expired in 1986, and that it had "made no determinations with respect to AT&T's lease rates for

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27/ *Id.*

28/ *Id.* (emphasis added).

29/ *Id.* (emphasis added).

30/ *Id.* at 6 (italics added) (underscore in original).

31/ *Id.* at 5.

CPE after the transition that would be undermined by the maintenance of the plaintiffs' lawsuit" here.[32/]

In light of this clarification of the limited scope of the Commission's intended preemption, the Illinois trial court granted the plaintiffs' motion for reconsideration and reinstated their complaint.[33/] AT&T and Lucent appealed that decision. After having sought refuge in the fact (if not the text) of the Commission's CPE orders, they argued on appeal that the question of whether plaintiffs' claims conflict with those orders "is a legal issue for the *court* to decide, *not the FCC*."[34/] The Illinois appellate court rejected their argument.[35/] It agreed with the trial court that "the claims and the remedies sought do not interfere with the FCC's goals and purposes," and that the Commission "did not preempt other state consumer-protection and contract laws or otherwise immunize telephone carriers from those laws."[36/] The court also noted that

> Defendants maintain that plaintiff's claims have been addressed and resolved by the restrictions imposed in the FCC implementation order. The record does not support defendants' argument. The restrictions referenced by defendants were only in effect during the two-year transition period. Those restrictions were lifted several years before this lawsuit was filed. Plaintiff's complaint challenges conduct and practices that occurred after the restrictions were lifted. Based on

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32/ *Id.* at 6-7. As noted above, plaintiffs' complaint makes no challenge to the transition program or any AT&T or Lucent conduct during that program, including its compliance with FCC requirements.

33/ Order, *Crain v. Lucent Technologies*, No. 96-LM-983 (Ill. 3d Jud. Cir. Ct., Madison County) (July 2, 1999).

34/ Appellate Brief of Defendants-Appellants Lucent Technologies Inc. and AT&T Corp., at 35 (filed Aug. 24, 1999) (emphasis added).

35/ *Crain v. Lucent Technologies, Inc.*, 739 N.E.2d 639 (Ill. App. Ct. 2000).

36/ *Id.* at 645.

> this record, we conclude that the claims made and relief sought do not interfere with the FCC's goal to further competition in the CPE market.[37/]

On April 4, 2001, the Supreme Court of Illinois denied AT&T and Lucent's petition for leave to appeal.[38/]

Lucent's Third Supplement does not challenge any of the conclusions reached by the Commission in its *Amicus* Memorandum to the Illinois court. Rather, it claims that "[t]he FCC *Amicus* Memorandum is fully consistent with what [Lucent] seeks."[39/] It now argues, however, that new "developments in late 2001"[40/] require Commission guidance (regarding precisely the kind of questions it previously advised the Illinois appellate court lay exclusively within *its* province). Apart from the filing of the Third Amended Complaint described above, which in no way altered the nature of plaintiffs' claims, these new "developments" consist solely of "reports and depositions" produced in response to discovery requests by the defendants themselves.[41/] They do not include any rulings by the court, and the trial has not yet begun.[42/]

Argument

Nothing in Lucent's Third Supplement provides any basis for revisiting the Commission's previous conclusions with respect to whether plaintiffs' claims are preempted by the Commission's CPE orders. Those conclusions accurately reflect what the Commission

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37/ *Id.* at 646.

38/ *Crain v. Lucent Technologies, Inc.*, 747 N.E.2d 352 (Ill. 2001).

39/ Third Supplement at 6.

40/ *Id.* at 1.

41/ *Id.* at 5.

42/ The trial in this action will be a bench trial. Though defendants recently moved for a jury trial, the court denied that motion on July 29, 2002.

intended (and did not intend) in its orders, which was simply deregulation of the CPE market: a goal that has been entirely achieved, and which the *Sparks* litigation simply could not, 20 years later, disrupt or compromise in any way. The Commission's observations in its *Amicus* Memorandum regarding the proper scope of its CPE preemption are also consistent with the essential premise of other Commission deregulatory initiatives, which carefully preserve the availability of state consumer protection remedies following Commission deregulation.

As the Commission noted in its *Amicus* Memorandum, a prime illustration of this reservation of consumer protection remedies came in the Commission's order detariffing long distance services:

> After our policy of complete detariffing has been implemented, carriers . . . will be subject to the same incentives and rewards that firms in other competitive markets confront. . . . Moreover, when [these services] are completely detariffed, consumers will be able to take advantage of remedies provided by state consumer protection laws and contract law against abusive practices.[43/]

Other examples abound. For instance, in the broadcast "underbrush" proceeding, the Commission specifically relied upon "effective remedies under state law" in repealing its own regulations governing fraudulent billing.[44/] And in the course of this very CPE leasing controversy, the Commission consistently assured Congress that AT&T's customers could seek relief from "state consumer protection offices."[45/]

43/ Second Report and Order, *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730 ¶¶ 4,5 (1996).

44/ Second Notice of Proposed Rule Making, *Elimination of Unnecessary Broadcast Regulation*, MM Docket No. 83-842, FCC 85-26, 1985 WL 89107 ¶ 4 (1985).

45/ *See* Letter from Kathie A. Kneff to Honorable Tim Hutchison, February 24, 1997 (IC-97-03740); Letter from Robert W. Spangler to Honorable Barbara A. Mikulski (undated) (IC-96-1000); Letter from Robert W. Spangler to Honorable Paul David Wellstone, April 16, 1996 (IC-96-02124); Letter from Robert W. Spangler to Honorable Jesse Helms, March 11, 1997 (IC-97-04092).

Lucent's claims that "developments in late 2001" nevertheless now require the extraordinary step of Commission intervention in state court proceedings are unavailing. They ignore the substantial limits on the scope of agency preemption, and the absence of any demonstration that preemption is necessary to protect some valid and continuing Commission policy. They continue to misstate the nature of the Commission's "findings"[46/] in its CPE orders, as well as the conduct at issue in the *Sparks* litigation. And they continue to mischaracterize as "utility regulation" relief or remedies that clearly involve nothing more than damages for violations of traditional state consumer protection requirements applicable to all firms in all markets. For all these reasons, the petition should be denied promptly, in order to avoid any potential "interfere[nce] with any state court proceedings," in accordance with the Commission's Public Notice.[47/] Even if the Commission were not prepared to reject the petition promptly, important principles of comity and federalism would require that the Commission dismiss the petition as unripe, unless and until there is some state court action that clearly warrants the extraordinary action contemplated here.

I. THE SCOPE OF PREEMPTION IS NARROW GENERALLY, AND EVEN NARROWER IN THE AGENCY CONTEXT.

Lucent's Third Supplement fails to begin at the beginning, which is the strong presumption against preemption in areas traditionally regulated by the states. The Supreme Court has made very clear the ways in which *Congress* may preempt otherwise valid state laws, and preemption by a federal agency acting pursuant to delegated authority from Congress can

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46/ Third Supplement at 2.

47/ "Comments Sought on Lucent's Third Supplement to Petition for Declaratory Ruling on State Consumer Protection Laws as They Relate to AT&T/Lucent Leasing of Customer Premises Equipment," Public Notice, WC Docket No. 02-147, DA 02-1533, at 1 (rel. June 28, 2002) ("Public Notice").

certainly be no broader.[48] Congressional preemption may occur in three ways. First, Congress can express its clear intent to preempt state law.[49] Second, it can so thoroughly occupy the legislative field that courts may conclude that there is no room for States to supplement the federal law.[50] Third, Congress can enact statutes that conflict with state law, either by rendering simultaneous compliance with both federal and state law impossible,[51] or where the state law stands as an obstacle to the purpose of the federal law.[52]

Even as to Congress, however, preemption is disfavored. In order to avoid "unintended encroachment on the authority of the States," courts are "reluctant to find pre-emption" with respect to "a subject traditionally governed by state law."[53] Indeed, the Supreme Court has repeatedly held that in such areas, principles of federalism generally counsel in favor of a "presumption against pre-emption" by Congress.[54] The consumer protection claims at issue in the Illinois litigation here clearly "pertain[] to a subject traditionally governed by state law," and thus there would be a strong presumption against preemption here *even if AT&T/Lucent's preemption claim were based on the Communications Act itself.*

48/ *See City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (agency preemption is valid only if it within the scope of authority delegated by Congress).

49/ *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

50/ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

51/ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

52/ *Hines v. Davidowitz*, 312 U.S. 52 (1941).

53/ *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993).

54/ *New York v. FERC*, 122 S. Ct. 1012, 1023 (2002) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

But it is not. Rather, AT&T and Lucent now ask *the Commission* to take the extraordinary action of disrupting pending state consumer protection litigation. And as the Commission recognized in its prior *Amicus* Memorandum,[55] federal agency preemption of state law must pass an even *stricter* standard.[56] The courts have made this standard quite clear:

> The FCC may not justify a preemption order merely by showing that *some* of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals. Rather, the FCC bears the burden of justifying its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals.[57]

Based on this unambiguous precedent, the scope of the Commission's preemption in its CPE orders clearly does not and cannot extend "outside the public utility tariffing context": In its CPE orders, the Commission "expressed no such intention and made no such showing" outside that context.[58] And as noted below, there is no reason to believe that enforcement of state consumer protection laws would in any way interfere with the deregulation of CPE, a goal realized almost 20 years ago and certainly complete — and beyond disruption — in the fully competitive, unregulated CPE market that exists today. Thus, the limited preemption intended by the Commission in its prior orders is both clear from the language of its orders, and compelled by the established limits on the scope of agency preemption of state law.

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[55] *Amicus* Memorandum at 4.

[56] Indeed, some courts have gone so far as to note that "it is axiomatic that Congress has not delegated, and could not delegate, the power to any agency to oust state courts . . . of subject matter jurisdiction." *Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996).

[57] *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990) (emphasis in original); *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989) ("the FCC may preempt inconsistent state regulation so long as it can show that the state regulation negates a valid federal policy.").

[58] *Amicus* Memorandum at 4.

II. UNDER THESE STANDARDS, THE AT&T/LUCENT PETITION SHOULD BE DISMISSED.

In its recent filing, Lucent does not challenge any of these conclusions reached by the Commission in its *Amicus* Memorandum, which, as noted above, it claims "is fully consistent with what [Lucent] seeks."[59/] Instead, it claims that "developments in late 2001" now make clear that certain of plaintiffs' claims "actually challenge previous FCC orders."[60/] This argument is both legally insufficient and factually unsupportable.

A. Lucent Has Made No Demonstration That Preemption Is Necessary To Prevent Negation of Valid FCC Regulatory Goals.

As we show in part II.B below, there are in fact no new "developments" in the *Sparks* case from 2001 that are inconsistent with any Commission finding. But as a threshold matter, Lucent has failed to articulate *any* way in which any of the claims in this state consumer protection action based on allegations of fraud and deception would interfere with any valid FCC goal or concern. Indeed, the *Sparks* case advances Commission goals.

As noted above, the Commission cannot simply determine to preempt state laws with which it disagrees. Even assuming that the agency is acting within the scope of the authority delegated by Congress, the Commission's preemption authority is limited to those state laws the application of which would demonstrably negate valid FCC regulatory goals. At the very end of its Third Supplement, Lucent makes a half-hearted effort to argue that the relief it seeks satisfies this standard. But its effort falls seriously short of the mark, and this failure alone requires denial of its petition.

59/ Third Supplement at 6.

60/ *Id.* at 1.

First, as noted, the Commission's primary goal in the CPE detariffing orders was to achieve a deregulated CPE market. The Commission achieved that goal 20 years ago — and the success of its efforts are obvious today. Firms from Radio Shack to Wal-Mart to General Electric to Hammacher Schlemmer now compete in the CPE market, and do so subject only to generally applicable state consumer protection laws. It is inconceivable that preempting the *Sparks* suit could be *necessary* to achieve — or even maintain — detariffing or deregulation of the CPE market. A suit based on deceptive conduct by one firm (and its successor) cannot "negate" the FCC's valid goal of ensuring that all firms could compete in the CPE market on equal footing: indeed, as the Commission noted in its *Amicus* Memorandum,[61/] by applying state law to AT&T and Lucent just as it would apply to any other competitor, the *Sparks* litigation should *advance*, not negate, the FCC's "valid regulatory goals."

Lucent nevertheless argues that allowing the Illinois litigation to proceed "will have major, long-term ramifications regarding the Commission's ability to successfully implement its statutory directives and policy goals."[62/] This vague suggestion does not get more specific. Whatever the merits may be of "managing" competition in other markets that are transitioning to competition,[63/] Lucent advances absolutely no basis for doing so in the CPE marketplace, which the Commission determined almost 20 years ago was no longer served by Commission regulation. Its only suggestion on this score is that the mere initiation of a trial in this case, even

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61/ *See Amicus* Memorandum at 6.

62/ Third Supplement at 2.

63/ *See, e.g.*, Michael K. Powell, *Letting Go of the Bike*, Address before Practicing Law Institute (Dec. 10, 1998), *available at* http://www.fcc.gov/Speeches/Powell/spmkp820.html.

prior to any court decision regarding the validity of the claims (or evidence) presented, "will infect the CPE market with uncertainty."[64/]

This claim does not begin to satisfy the rigorous standard for preemption. And it is overblown in any event. This is not a case about "the CPE market," or about any retail providers of CPE, or even about any other firms that lease CPE.[65/] Nor is it a case about those who purchased (or leased) CPE beginning after 1983. It is solely a claim against AT&T (and its successor) by consumers who began leasing CPE from AT&T *before 1984* (which marked the beginning of the FCC transition period), and allege that they were misled into *continuing* to do so *following* the conclusion of the transition period. And, in any event, as noted above and in the Commission's *Amicus* Memorandum, applying the same state consumer protection laws to AT&T as are applicable to Radio Shack, Wal-Mart and other participants in the deregulated CPE marketplace *promotes* rather than disserves "certainty," by ensuring the efficient operation of markets and the Commission's deregulatory goals.[66/]

In truth, the only "certainty" Lucent is seeking, or that FCC intervention could now provide, is the certainty of immunizing AT&T and Lucent from such generally applicable state law liability otherwise applicable to all other firms, long after the Commission got out of the

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64/ Third Supplement at 18. Lucent also suggests that there will be other CPE litigation. As noted above, that suggestion ignores the status of other stayed cases and their relationship to this as the lead case, representing a nationwide class. It also fails to explain how those cases would in any event result in a "drain on [FCC] resources." *Id.*

65/ In fact, the only other firm subject to any FCC transition program for leased CPE was GTE, which has already reached a settlement agreement involving similar claims. [That agreement has received preliminary court approval, and is scheduled for a fairness hearing in September 2002. Preliminary Approval Order, *Fisher v. Verizon South Inc.*, Civil Action No. 02-792-GR (April 12, 2002).]

66/ *Amicus* Memorandum at 5-6.

business of regulating this market. Establishment of that precedent would be neither laudable nor valid as a Commission goal.

B. The Ostensibly New Developments Provide No Basis for Commission Intervention.

As noted above, the only "developments in late 2001" that even Lucent can allege as a basis for filing its Third Supplement — in May 2002 — are not decisions or determinations by the court, or even new filings by the plaintiffs. These "developments" are simply Lucent's characterizations of discovery materials produced over the past year, and *its* assertions about what theories the plaintiffs *might* develop in a case that, after six years, is finally set for trial in August 2002. But Lucent's arguments mischaracterize the nature of plaintiffs' claims as set forth in the Third Amended Complaint, as well as the extent to which such claims are limited by any "findings"[67/] in the Commission's CPE orders.

1. Lucent's argument about market power misstates the Commission's orders as well as the *Sparks* claims.

Lucent begins its "market power" discussion with claims about how the Commission defined and characterized "the CPE market" that are wholly unsupported by the language of the CPE orders upon which it purports to rely. Indeed, Lucent begins with an inaccurate quotation of those orders to the effect that AT&T's "CPE operations in recent years have been, and for the foreseeable future will be, very much susceptible to competition."[68/] But that is not all the Commission said in that sentence, and the additional language is critical to any analysis of whether the *Sparks* plaintiffs are alleging anything inconsistent with FCC "findings." Here is what the Commission really said:

67/ Third Supplement at 2.

68/ *Id.* at 7.

> [W]hile AT&T's CPE operations in recent years have been, and for the foreseeable future will be, very much susceptible to competition, *AT&T's installed base remains so great that it is difficult to warrant with requisite certainty that immediate and total deregulation of embedded CPE would not lead to undesirable disruptions in the availability of CPE to the Nation's users at reasonable prices.*[69/]

This hardly suggests that the *Sparks* plaintiffs' concerns about AT&T's "installed base" are inappropriate.

Nor, in any event, is Lucent able to explain how *any* definition of the markets by the *Sparks* court would negate any valid Commission policy. Indeed, the notion that this Commission alone "has jurisdiction to determine whether [Lucent] has market power over CPE"[70/] is remarkable — particularly since the Commission detariffed CPE almost 20 years ago, noting at that time that

> as equipment is deregulated, we will not be concerned with whether or not a carrier chooses to compete as a new business venture or whether a carrier chooses to serve a particular market. . . . Our obligation in this area is to insure that [a] carrier's unregulated activities remain divorced from its public utility services.[71/]

Thus, the Commission had and has today no conceivable interest in whether or not AT&T (or Lucent) is deemed by any court to have — or not have — market power in any market today.

69/ Report and Order, *In the Matter of Procedures for Implementing The Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry) American Telephone and Telegraph Company, Request for Approval To Supplement the Capitalization of AT&T Information Systems in Connection with the Transfers of Embedded Customer Premises Equipment*, 95 F.C.C.2d 1276 ¶ 34 (1983) ("*Implementation Order*") (*italics omitted from Lucent's Third Supplement*). Lucent's other citations are no more illuminating. Paragraph 69 of the *Implementation Order*, for example, discussed the Commission's expectation that the BOCs will offer single-line CPE; paragraph 70, "the relationship between sales prices and net book value." *Id.* ¶¶ 69-70. In none of these places (or any other cited by Lucent) does the Commission give even passing consideration to market definition issues.

70/ Third Supplement at 8.

71/ *Further Reconsideration Order* ¶ 37.

But even more to the point, Lucent *also* mischaracterizes the claims in *Sparks*. Plaintiffs' case does not rest upon the assertion that "the CPE market"[72] itself is not competitive, or that Lucent and/or AT&T possesses market power in the equipment market.[73] Indeed, the only "market" with which the class action is concerned (or which an FCC preemption order could affect) is the narrow, limited "market" of mostly elderly consumers who have continued, in many cases unknowingly, to lease CPE from AT&T/Lucent since 1983.

In fact, plaintiffs' claim is *precisely what Lucent itself concedes concerned the Commission at the time of detariffing*. In Lucent's own words, the FCC was concerned that "AT&T might leverage its strengths from other markets or other services."[74] That is clearly true. The Commission found there to be a "risk[] that largely captive monopoly ratepayers will be burdened by anti-competitive conduct."[75] Thus, far from pointing to any inconsistency with the Commission's statements in the CPE orders (much less with any valid FCC policy), the gist of plaintiffs' complaint, which is concerned with those same captive ratepayers who continued to lease CPE for many years, is fully *consistent* with this Commission's concerns in 1983.

Lucent's claim that plaintiffs' suit would subject AT&T to *special* scrutiny because of the prospect of its leveraging its position in related markets has it backwards; in fact, AT&T is being treated just like any other company. Lucent's argument that consumer protection laws "should apply equally to AT&T"[76] simply begs the question whether AT&T's acts uniquely exposed it to

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72/ Third Supplement at 2.

73/ *See Id.* at 7 & n.20.

74/ *Id.*

75/ *Final Decision* ¶ 12.

76/ Third Supplement at 8 (quoting *Amicus* Memorandum at 7) (emphasis omitted).

liability under such equally applicable laws. What applies equally to AT&T — as well as to Radio Shack and Wal-Mart — is the obligation under Illinois and New Jersey law not to deliberately conceal material information from telephone customers. The fact that AT&T alone may have had a unique opportunity to engage in such concealment, by such leveraging is no basis for preempting application of those traditional state law duties. Indeed, as noted above, that is precisely the concern that the FCC had in 1983. Thus, adducing evidence that AT&T itself believed as late as 1997 that "[o]ur customers are not like any other industry," or that notification of leasing status "will confuse the many aged customers that don't even know that there was a problem,"[77] is hardly inconsistent with any Commission finding about "market power." Nor is evidence of AT&T's unique ability to engage in classic monopoly pricing measures.[78] The only position with which such claims are inconsistent is Lucent's own position on the merits.

2. State court litigation of plaintiffs' claims is not "tantamount to allowing . . . utility-type rate regulation of CPE."[79]

Lucent next argues that any award of damages to the plaintiffs would amount to a form of ratemaking, because it would necessarily rely on a determination of what the proper lease rate for a telephone would be.[80] This claim has already been rejected by the Commission (in its *Amicus* Memorandum) and by the Illinois courts (in their refusal to dismiss plaintiffs' case on preemption grounds). As the Commission noted, its two-year prescription of lease rates expired

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77 E-mail from Harry Blalock to Denise Zaug, Feb. 20, 1997.

78 *See* Charlotte TerKeurst, Competitive Strategies Group, Ltd., *Assessment of AT&T and Lucent Telephone Lease Business*, Nov. 2, 2001, at 2-6.

79 Third Supplement at 11.

80 *Id.* at 10-11.

in 1986, and it "made no determinations with respect to AT&T's lease rates for CPE after the transition that would be undermined by the maintenance of the [*Sparks*] lawsuit."[81/] In any event, Lucent's characterization of plaintiffs' damages claims as "utility-type regulation" has no basis in logic or in plaintiffs' Third Amended Complaint.

As noted above, the remedy plaintiffs seek cannot be construed as an attempt to reset lease rates, prospectively *or* retroactively. Plaintiffs seek damages *in the amount of the full extent of their lease payments*, on the theory that, had AT&T and Lucent complied with their obligations under state consumer protection laws, *plaintiffs never would have leased their phones at all.* The Third Amended Complaint alleges that, given the *de minimis* value of residential CPE,[82/] damages should be calculated as the "amount equal to all charges which Defendant AT&T and its successor Lucent have collected from each of [the plaintiffs] for residential telephone rental from January 1, 1986, through January 20, 2000, as well as other damages which may be established at trial."[83/] There is thus no need to determine what a "proper lease rate" is or should have been here,[84/] and — as the Commission has already recognized — no "traditional utility type regulation over CPE" is sought in this common law action for damages under state consumer protection laws.[85/] That defendants' conduct with respect to highly vulnerable consumers has been unconscionable may certainly be supported by the fact that these lease charges were wildly out of proportion to any measure of AT&T's costs in providing the

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81/ *Amicus* Memorandum at 6-7.

82/ Third Amended Complaint ¶ 21.

83/ *Id.* ¶ 29.

84/ Such would be a difficult task indeed, as there is virtually no competition in the leasing of telephones, as with any other small household appliance.

85/ *Amicus* Memorandum at 2-3.

service. Nonetheless, proof of that fact does not transform a claim for complete refunds into a tariff proceeding before the Illinois Commerce Commission (or even before the court)—particularly for the amount of all lease payments *after* the transition.

3. Plaintiffs do not seek to challenge the AT&T notification approved by the FCC, or any other pre-1986 conduct.

Contrary to Lucent's insinuations, plaintiffs do not seek redress for any pre-1986 actions or omissions — as their Third Amended Complaint makes clear, and as the Illinois appellate court squarely held. As noted above, the gravamen of plaintiffs' claims is that AT&T (and later Lucent), *following the transition period*, knowingly and intentionally concealed from primarily elderly and disabled consumers the facts (among others) that they were actually leasing their telephones, that there was no need to do so in order to continue to receive telephone service, and that their alternatives would have been in many cases over two hundred times less expensive.

Lucent now claims, as it did before the Illinois courts, that "[in] ratifying [AT&T's proposed] notification procedures" the Commission forever immunized it from generally applicable consumer protection laws requiring adequate disclosure of information *after the CPE transition period.*[86] But as the Commission and the courts have both recognized, that argument has no support in either the text or the purpose of the CPE orders. In issuing the CPE orders addressing the transition period, the Commission was concerned with the *FCC's* policy goals. But whether or not the FCC found AT&T's proposed sale and lease program "consistent with [*FCC*] objectives in [the CPE] proceeding"[87] is not the question at issue in the plaintiffs' action, either generally or with respect to the disclosure issue. That question is whether, in approving that AT&T proposal, the FCC intended to preempt *all state consumer protection duties*, in each

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[86] Third Supplement at 12-15.

[87] *Id.* at 14-15 & n.53 (quoting *Implementation Order* ¶ 21).

of the 50 states, that AT&T would otherwise have had *after* the FCC transition period, and whether such sweeping preemption would have been necessary to avoid negating some valid Commission goal — when the FCC no imposes Title II regulation on CPE.

As explained above, and as the Commission's *Amicus* Memorandum and CPE orders make clear, that question is not even close. Lucent can point to nothing in the CPE orders that supports its assertions. Indeed, its pleading is long on descriptions of those orders, but short on quotations from them. Nowhere in the orders themselves did the FCC express any intention to preempt *any* state law concerning adequate notification — either before or after the transition period. It never addressed the question one way or the other. But it did note that the scope of its preemption was intended to be quite limited: "we preempt the states here only to the extent that their terminal equipment regulation is at odds with the regulatory scheme set forth."[88/] Nor did the Commission ever suggest, as Lucent contends, that the AT&T-proposed notification program was "necessary or useful"[89/] for protecting consumers' interests in full disclosure of lease terms and conditions. What it found "necessary or useful" was something quite different — AT&T's proposal for how to permit customers to allow other vendors to obtain customer proprietary information.[90/] When addressing the notification requirement relevant here, all the Commission said — in the *relevant* part of the *Implementation Order*, ignored by Lucent — was that for most

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88/ *Reconsideration Order* ¶ 154. Lucent suggests that the Commission rejected state public utility commission efforts "to require additional notices or sale options." Third Supplement at 13. Its citations, however, do not involve state proposals for notification programs at all; they involve proposals for sale of the embedded base to ATTIS and for continued state tariffing.

89/ Third Supplement at 15.

90/ *See Implementation Order* ¶¶ 119-28.

customers, "this *may* be all the information that is necessary or useful for facilitating the customer's opportunity to seek alternative providers."[91/]

This is decidedly not the stuff of agency preemption of long established state consumer protection policies. It includes no statement that the AT&T-proposed notice would preempt any other requirements of state law — even prior to the end of the transition period.[92/] Nor does Lucent explain why any such preemption would have been necessary to avoid negating any valid agency goal. Rather, the whole purpose of the Commission's orders was simply to devise "workable and equitable solutions"[93/] to get to detariffing — one "in a series of steps to isolate terminal from transmission offerings, increase consumer choice, and to open equipment markets to full and fair competition."[94/] Its purpose was *not* to serve as a consumer protection agency for a product the Commission was spinning off from Title II regulation.

In light of the absence of *any* Commission indication that its notification program was designed to be exclusive, and *any* articulation of how such exclusivity would be necessary to serve any valid regulatory goal, the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, is dispositive of Lucent's notification argument. In that case, unlike here, the federal government had *expressly* preempted certain state notification regulations. Congress itself had *specifically* barred states from requiring any "statement relating to smoking and health" on any cigarette package other than the statement required under federal law.[95/] Notwithstanding this

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91/ *Id.* ¶ 125 n.107 (emphasis added).

92/ It is hardly surprising that the Commission did not attach preemptive effect to a notice proposed by AT&T itself.

93/ *Id.* ¶ 38.

94/ *Final Decision* ¶ 180.

95/ *Cipollone*, 505 U.S. at 514.

express intention to preempt other such statements by Congress itself, the Supreme Court *refused* to preempt state law damage claims against the cigarette companies that were based on a failure to warn. Rather, the Court construed the statutory preemption provision as limited to "positive enactments by legislatures or administrative agencies that mandate particular warning labels."[96] In determining that the statutory restriction did *not* preempt state law damages claims, the Court focused on three factors:

> First, . . . we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. . . . Second, the warning required by § 4 does not by its own effect foreclose additional obligations imposed under state law. That Congress requires a particular warning label does not automatically pre-empt a regulatory field. Third, there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common-law damages actions.[97]

The Court thus drew two distinctions relevant here, in light of the presumption against preemption. First, the mere existence of a federal disclosure requirement — even one coupled with an express preemption provision regarding disclosure — will not be presumed to preempt state law requiring additional disclosures. Second, the Court pointed out that state damages actions are *not* incompatible with federal disclosure requirements, because the two have different purposes. In his separate opinion, Justice Blackmun elaborated on this distinction:

> The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages by its very nature attaches additional consequences to the manufacturer's continued unlawful conduct, no particular course of action (*e.g.*, the adoption of a new warning label) is required. . . . The

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[96] *Id.* at 518-19. A plurality of the Court did preempt such damage claims under a later statute that expressly extended the prohibition to state "law" as opposed to a state "statute or regulation." *Id.* at 523. But as noted above, here the Commission was careful to limit its preemption only to state "terminal equipment regulation" that is "at odds with the regulatory scheme we have set forth," i.e., "traditional utility type regulation over CPE." *Reconsideration Order* ¶ 154; *Further Reconsideration Order* ¶ 33.

[97] *Cipollone*, 505 U.S. at 518 (internal citations omitted).

> level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations. Moreover, tort law has an entirely separate function--compensating victims--that sets it apart from direct forms of regulation.[98/]

These principles lend even further support to the Commission's position in its *Amicus* Memorandum, and underscore why the conclusions in that memorandum remain valid and need not be revisited. First, here the notification designed to accompany the two-year transition period was never accompanied by any express preemption of state law of any kind (other than the limited reference to "utility-type regulation" elsewhere in the orders). Second, here, as in *Cipollone*, plaintiffs' damages action "has an entirely separate function" of "compensating victims" for deceptive conduct, one that is different from "direct forms of regulation."

And most important, this Commission is not Congress. It could only have preempted state law if it had done so expressly and if doing so had been necessary to avoid negating a valid agency goal. Given the Commission's purpose in its detariffing plan, under which the transition period was simply a way of achieving regulatory detariffing some 20 years ago, making such a case would be exceedingly difficult, and indeed antithetical to the whole purpose of extricating CPE from Title II regulation. The Commission never even attempted to make that case. *Cipollone* is thus controlling on Lucent's effort to recycle its notification argument here.

III. IN ANY EVENT, GRANTING THE PETITION IN ADVANCE OF ANY STATE ACTION WOULD BE AN UNPRECEDENTED DEPARTURE FROM ESTABLISHED PRINCIPLES OF FEDERALISM.

As noted above, Lucent has provided neither a legal nor a factual basis for revisiting the conclusions of the Commission and the Illinois courts that the CPE orders did not preempt the application of state consumer protection laws to AT&T after CPE detariffing. Moreover, as we

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98/ *Id.* at 536-37 (Blackmun, J., concurring in relevant part (writing for himself, Kennedy, J., and Souter, J.)) (internal citations omitted).

have shown, such preemption would not have been supportable, because it was not then and certainly is not now necessary to avoid negating any valid FCC regulatory goal. Accordingly, and in order to ensure that the Commission does not "interfere with any state court proceedings,"[99/] the pending petition should be denied as promptly as practicable.

But in any event, the remarkable proposition that this Commission should issue edicts to a state court regarding how to try these pending consumer protection claims, and what kinds of evidence the court should and should not admit, should be rejected outright. It is one thing to preempt the application of state laws that frustrate legitimate federal policies (which judicial endorsement of the *Sparks* claims decidedly would not). It is quite another for a federal agency to preempt private litigants' rights even to try to *assert* a claim under a generally applicable state law. Notwithstanding Lucent's "Pandora's box" speculations,[100/] there is no conceivable basis for arguing that the mere *litigation* of state consumer protection claims would negate any valid FCC regulatory goals: clearly, it is only the court's decision, and any remedies it grants, that might even conceivably "conflict" with any FCC policy. But that determination can be made only once a court decision is made and relief is ordered. Interfering at *this* stage to bar plaintiffs from asserting their claims before the court, or to bar the court from hearing evidence, cannot conceivably serve any legitimate FCC policy. The Commission has consistently recognized as much. "Whenever possible," it has "sought to let proceedings at the state level move to

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99/ Public Notice at 1.

100/ Third Supplement at 18.

completion if that may eliminate the need for preemption, especially where state proceedings are moving expeditiously."[101/]

The Supreme Court has repeatedly recognized the affront to principles of federalism inherent in federal government efforts to interfere with pending state litigation. In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held improper a federal district court's injunction of a state criminal prosecution. The most "vital consideration" at the root of the Court's decision was

> . . . the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.[102/]

This same respect for state functions applicable to Article III courts militates here against presuming that the court will misconstrue or interfere with the Commission's orders or policies. As the Supreme Court noted in *Samuels v. Mackell*, 401 U.S. 66 (1971), "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of state proceedings that the longstanding policy limiting injunctions was designed to avoid."[103/] Avoiding such disruption is no less appropriate here, where the plaintiffs are acting as "private attorneys

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[101/] Memorandum Opinion and Order, *In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd 1619 ¶ 21 (1992), *aff'd sub nom. Georgia Pub. Serv. Comm'n v. FCC*, 5 F.3d 1499 (11th Cir. 1993).

[102/] *Younger*, 401 U.S. at 44. *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (same concerns in non-criminal proceeding); *Juidice v. Vail*, 430 U.S. 327 (1977) (same); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982) (same). The *Younger* Court also saw no reason to grant the moving party relief at the federal level when he could obtain equivalent relief before the state court. 401 U.S. at 43-44, 49. Lucent, of course, has shown itself very capable of raising its preemption claims in the course of the state court proceedings.

[103/] *Id.* at 72.

general," seeking to enforce state consumer protection policies that traditionally have been at the core of state police powers and thus "implicate important state interests."[104/] And the Commission has recognized as much, noting that it has no intention of "interfer[ing] with any state court proceedings,"[105/] that result is inevitable as long as this preemption proceeding continues. Furthermore, the AT&T/Lucent petition should be dismissed in any event.

Conclusion

For the foregoing reasons, the petition for declaratory ruling filed by AT&T and Lucent should be denied as expeditiously as practicable.

Respectfully submitted,

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104/ *Middlesex County Ethics Comm.*, 457 U.S. at 432.

105/ Public Notice at 1.

CERTIFICATE OF SERVICE

I, Carole Walsh, do hereby certify that on this 29th day of July, 2002, I have caused true and correct copies of the foregoing Comments of Charles Sparks *et al.* to be served by hand delivery upon the following parties:

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